**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **BRAD BELL** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 231,011 |
| **MIDWEST CONSTRUCTION COMPANY, INC.** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **BUILDERS' ASSOCIATION** | ) | |
| **SELF-INSURERS' FUND** | ) | |
| Insurance Fund | ) | |

## ORDER

Claimant appealed the February 8, 2001 Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on August 15, 2001, in Topeka, Kansas.

### APPEARANCES

John J. Bryan of Topeka, Kansas, appeared for claimant. Wade A. Dorothy of Lenexa, Kansas, appeared for respondent and its insurance fund.

### RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, the record also includes the transcript from the April 15, 1998 preliminary hearing.

### ISSUES

This is a claim for a June 3, 1997 accident and an alleged back injury. In the February 8, 2001 Award, Judge Avery found that claimant failed to prove that he injured his back while performing work for respondent and, therefore, denied claimant's request for benefits.

Claimant contends Judge Avery erred. Claimant argues that he injured his back on the date alleged while unloading guardrail. Therefore, claimant requests the Board to reverse the Award and grant him benefits for a permanent total disability or, in the alternative, either an 85.5 or 100 percent permanent partial general disability.

Conversely, respondent and its insurance fund argue the Award should be affirmed.

The issues before the Board on this appeal are:

1. Did claimant injure his back while performing work for respondent?

2. If so, what is the nature and extent of the injury and disability?

3. What is claimant's average weekly wage?

4. Is claimant entitled to future medical benefits?

## FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. In 1994 claimant began working for respondent, which is a construction company that builds bridges and box culverts. The Board finds that it is more probably true than not that on June 3, 1997, claimant injured his back while working for respondent. At the time of the accident, claimant was working with guardrail and felt a pop in his low back and pain running through his right hip. The record is uncontradicted that claimant immediately reported his symptoms to his supervisor and spent the remainder of the workday lying down.

2. When claimant arrived home the evening of the accident, he told his wife that he had hurt his back while unloading guardrail and that he had heard his back pop. Believing he may have broken a graft in his hip, claimant sought treatment at the KU Medical Center where, in January 1997, he had undergone right hip surgery.

3. The day after the accident, claimant saw Dr. Kimberly Templeton at the KU Medical Center. After conducting various tests, Dr. Templeton determined that claimant's hip graft was intact and referred claimant to Dr. Glenn M. Amundson to evaluate claimant's low back pain. Dr. Amundson determined that claimant had sustained a disk injury superimposed on a degenerative disk condition affecting the L3-4, L4-5, and L5-S1 disks. In a December 28, 1998 medical report, Dr. Amundson diagnosed claimant's condition, as follows:

> Based on my evaluation of Mr. Bell [claimant], he presents with a history of permanent aggravating injury to his low back as a result of the accident of June 3, 1997 arising out of his employment. In regard to the lumbosacral

> spine region, Mr. Bell appears to have suffered a disk injury superimposed on his degenerative disk condition affecting the L3-4, L4-5, and L5-S1 disks. Each of these disks, on fluoroscopically-guided provocative diskography, contributed or significantly reproduced his pain pattern. In addition, it is suspected that due to the more significant disk degeneration accompanied by disk space narrowing at the L4-5 and L5-S1 levels, that there may be some mild positional lateral recess or foraminal stenosis that results in positional radiculopathy affecting the right L5 nerve route [sic]. . . .

Based upon that diagnosis and using the fourth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), Dr. Amundson found that claimant now has a 10 percent whole body functional impairment as a result of the June 3, 1997 accident.

4. Dr. Amundson believes that claimant should now be restricted to a sedentary physical demand level, or less. Additionally, the doctor believes claimant's occasional lifting should be restricted to 10 pounds and that claimant should avoid any sustained or awkward postures of the lumbar spine, and avoid repetitive bending, pushing, pulling, twisting, or lifting activities. In his December 28, 1998 report, the doctor indicated that claimant had a one time sitting limit of 30 to 40 minutes but that claimant could stand for one hour.

Bud Langston, who was hired by claimant to be a vocational rehabilitation expert in this claim, identified 14 work tasks that claimant had performed over the 15-year period before the accident. Dr. Amundson reviewed that list and indicated that claimant should no longer perform any of those tasks. Therefore, according to the treating physician, claimant has a 100 percent task loss.

5. Respondent and its insurance fund hired board certified orthopedic surgeon Jeffrey T. MacMillan to evaluate claimant and testify in this claim. Dr. MacMillan examined claimant in July 1999 and diagnosed multiple levels of lumbar degenerative disk disease. According to this doctor, claimant has a five percent whole body functional impairment according to the AMA *Guides*. Dr. MacMillan reviewed the list of former work tasks prepared by Dick Santner, respondent and its insurance fund's vocational rehabilitation expert, and found that claimant had lost the ability to perform between 14 and 18 of a total of 21 former work tasks.

Dr. MacMillan indicated that claimant had lost the ability to perform approximately 18 of the 21 tasks, or 86 percent, if the doctor used the restrictions that he set forth in his July 1, 1999 letter to respondent's insurance fund. Those restrictions were:

> No repetitive or extended periods of bending, stooping, pushing, pulling, lifting or carrying greater than 10 lbs. He [claimant] should not be required

> to maintain any position for an extended period of time (greater than 30 minutes).

But Dr. MacMillan indicated claimant had only lost approximately 14 of the 21 former work tasks, or 67 percent, if the doctor used the more general restrictions set forth in his September 5, 2000 letter to respondent's insurance fund. The doctor, who acknowledged that claimant's condition had not changed since the July 1999 examination, modified claimant's restrictions in the September 5, 2000 letter, as follows:

> No repetitive or extended periods of bending, stooping, heavy lifting or carrying.

6. Judge Avery requested an independent medical evaluation by Dr. Peter V. Bieri, a Fellow of the American Academy of Disability Evaluating Physicians. Dr. Bieri examined claimant in February 2000 and rated claimant as having a 14 percent whole body functional impairment as a result of his low back condition. In his February 9, 2000 report, Dr. Bieri indicated that claimant meets the light physical demand level as defined by the Department of Labor's Dictionary of Occupational Titles. According to the doctor's report, the light physical demand level would limit claimant's lifting, as follows:

> This would limit occasional lifting to 20 pounds, frequent lifting not to exceed 10 pounds, and negligible constant lifting.

Dr. Bieri reviewed Mr. Langston's task list and found that claimant had lost the ability to perform 10 of 14, or 71 percent, of his former work tasks.

7. After considering the medical opinions provided by Doctors Amundson, Bieri, and MacMillan, the Board finds that claimant now has a 10 percent whole body functional impairment and an 86 percent task loss. The 86 percent task loss was derived from averaging Dr. Amundson's 100 percent task loss opinion with Dr. Bieri's 71 percent task loss opinion and Dr. MacMillan's 86 percent task loss opinion. The Board did not give Dr. MacMillan's 67 percent task loss opinion any weight as he could not justify modifying claimant's restrictions. Moreover, the Board finds that Dr. MacMillan's 86 percent task loss opinion was more credible than the lower percentage of task loss.

8. Claimant's average weekly wage on the date of accident was $518.42, which is calculated by adding the following: (1) claimant's weekly straight (non-overtime) time wages of $392 ($8 per hour x 49 hours per week), (2) claimant's average weekly overtime of

$11.14,[1] (3) the weekly value of employer-paid health insurance benefits of $105.66, and (4) the weekly average for bonuses paid of $9.62.

9. Other than performing some minor remodeling jobs, claimant has not worked following the June 1997 incident at work. Because of his symptoms, claimant discontinued that work and in March 1999 began receiving Social Security disability benefits. Respondent and its insurance fund have not offered vocational rehabilitation assistance and claimant's efforts to obtain vocational assistance from the State of Kansas have been denied. At the time of the July 2000 regular hearing, claimant was unemployed but receiving Social Security disability benefits. Claimant was not seeking gainful employment. In July 2000, claimant was serving without pay as fire chief of the Whiting, Kansas, volunteer fire department, a job which claimant testified required him only to drive to fires and prepare paperwork. At the time of regular hearing, claimant was 31 years old and a high school graduate. Since entering the workforce, claimant has primarily performed jobs requiring physical labor.

Claimant's vocational expert, Bud Langston, testified that claimant's principal obstacles in obtaining employment are his limited ability to sit and stand, the restrictions limiting him to sedentary work and his need to lie down during the day. Mr. Langston did not believe there was any vocational program that would benefit claimant in returning him to work. Therefore, Mr. Langston believed claimant was not employable.

On the other hand, respondent and its insurance fund's vocational expert, Dick Santner, testified that claimant could perform a number of occupations, including that of a casino dealer, a city bus driver, a school bus driver, an accounting clerk, a fast food deliverer, a buffet cashier, an income control clerk, or a PBX operator. According to Mr. Santner, claimant retains the ability to earn between $7 and $14.75 per hour.

10. None of the three doctors who either treated or examined claimant for purposes of this claim were asked whether they believed claimant could perform substantial and gainful employment. On the other hand, all three doctors indicated that claimant should observe permanent work restrictions and limitations, which, upon their face, do not restrict claimant from performing substantial and gainful employment. Considering the entire record, the Board finds that claimant has failed to prove that he is unable to work and, therefore, the Board concludes claimant should receive permanent partial general disability benefits rather than benefits for a permanent total disability.

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[1] The average weekly overtime is calculated by subtracting the $392 weekly base rate from claimant's gross weekly wages and averaging the remainder by the seven weeks that claimant worked in the 26-week period preceding the date of accident. That formula yields $78 for overtime wages, or a weekly average of $11.14 ($78 divided by seven = $11.14).

## CONCLUSIONS OF LAW

1. The Award should be reversed to award claimant permanent partial general disability benefits for a 66 percent permanent partial general disability.

2. Claimant permanently injured or aggravated his low back while working for respondent on June 3, 1997. That accident and the resulting permanent injury arose out of and in the course of employment with respondent.

3. Claimant's back injury is an "unscheduled" injury. Therefore, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 1996 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[2] and *Copeland*.[3] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against having a work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon an ability to earn rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

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[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[4]

4. Claimant is not looking for work as he is receiving Social Security disability benefits. But the Social Security Administration's finding that claimant is entitled to federal disability benefits is not binding on the Division of Workers Compensation and does not excuse claimant from making a good faith effort to look for work, unless such search would be futile. Based upon the testimony of Dr. Amundson and the independent medical report of Dr. Bieri, the Board finds and concludes that claimant retains the ability to perform some jobs in the light physical and sedentary physical demand levels. Therefore, claimant's failure to attempt to find appropriate employment constitutes a lack of good faith. The Board imputes a post-injury wage and finds and concludes that claimant retains the ability to earn approximately $7 per hour, or $280 per week. Comparing the $280 imputed post-injury weekly wage to claimant's $518.42 pre-injury wage creates a 46 percent wage loss for purposes of the permanent partial general disability formula.

5. Averaging the 46 percent wage loss with the 86 percent task loss creates a 66 percent permanent partial general disability for which claimant is entitled to receive benefits.

6. The claimant is entitled to an award of authorized medical benefits for the reasonable and necessary treatment administered to claimant by Dr. Templeton, Dr. Amundson, and their referrals. Claimant is entitled to receive unauthorized medical benefits up to the statutory maximum. Claimant may also apply for additional medical benefits in a proper application filed with the Director of Workers Compensation.

## AWARD

**WHEREFORE**, the Board reverses the February 8, 2001 Award and grants claimant a 66 percent permanent partial general disability and medical benefits.

Brad Bell is granted compensation from Midwest Construction Company, Inc., and its insurance fund for a June 3, 1997 accident and resulting disability. Based upon an average weekly wage of $518.42, Mr. Bell is entitled to receive 84.14 weeks of temporary total disability benefits at $338 per week, or $28,439.32, plus 211.72 weeks of permanent partial disability benefits at $338 per week, or $71,560.68, for a 66 percent permanent partial general disability and a total award of $100,000.

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[4] *Copeland*, p. 320.

As of September 25, 2001, claimant is entitled to receive 84.14 weeks of temporary total disability compensation at $338 per week, or $28,439.32, plus 140.86 weeks of permanent partial general disability compensation at $338 per week, or $47,610.68, for a total due and owing of $76,050, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $23,950 shall be paid at $338 per week until paid or until further order of the Director.

Claimant is entitled to authorized medical benefits for the reasonable and necessary medical treatment provided to claimant by Dr. Templeton, Dr. Amundson and their referrals. Claimant is entitled to receive unauthorized medical benefits up to the statutory maximum. In addition, claimant may seek future medical benefits by filing a proper application with the Director of Workers Compensation.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this ____ day of September 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

## DISSENT

I respectfully disagree with the majority. I believe the greater weight of the evidence establishes that claimant is unable to work in the competitive labor market and, therefore, should receive permanent total disability benefits.

First, claimant's work experience is limited to physical labor. When respondent and its insurance fund failed to provide vocational assistance, claimant sought vocational rehabilitation through the State of Kansas but was found too severely impaired to qualify for services.

Second, claimant has testified that often he must lie on the floor to relieve his back pain. That testimony was uncontradicted and credible. Claimant now takes three

prescription medications, including a narcotic. Although Dr. Amundson was not asked whether he believed claimant retained the ability to engage in substantial and gainful employment, his September 1, 1998 medical notes indicate that claimant should avoid surgery (a three-level fusion) as long as possible but, instead, consider applying for Social Security disability benefits. The doctor also recommended services through a multi-modality chronic pain clinic, which the record does not indicate were ever provided.

Third, Mr. Langston's testimony is persuasive that claimant is unable to work and that he is too impaired to be rehabilitated to the extent that he could return to work.

Finally, even respondent and its insurance fund's expert medical witness, Dr. MacMillan, stated claimant would have days when he feels he cannot do anything or get out of bed. The doctor testified, in part:

> . . . It [an MRI] shows that he [claimant] has a sore -- or will likely have a sore back. And so he is not going to be in a position where he is putting himself at great risk by doing any specific activity, and hence, the restrictions that we give are rather broad. **There are going to be some days when he feels that he can't do anything at all, can't get out of bed.** . . .[5] (Emphasis added.)

Claimant has proven a permanent total disability.

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Fund
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

[5] Deposition of Dr. Jeffrey T. MacMillan, November 21, 2000; p. 18.